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No. 16-373

IN THE
Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Petitioner,

v.

ANZ SECURITIES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Second Circuit

BRIEF OF DeKALB COUNTY PENSION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus DeKalb County Pension Fund administers a pension plan that manages approximately $1.3 billion in assets on behalf of current and former employees of DeKalb County, Georgia. As part of its duty to protect the retirement savings of participants in the pension plan, *amicus* has participated in class-action lawsuits seeking to recover damages from securities issuers that have violated federal securities laws and caused losses to the fund. Because *amicus* manages the retirement savings of civil servants, *amicus* has a longstanding institutional interest in preserving the viability of the class-action mechanism for protecting the rights of investors — those who, on their own, could not feasibly or economically press a securities lawsuit. In fact, *amicus* has itself been prevented from seeking to recover for losses to its pension plan under the rule announced in *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), and applied in the proceedings below. *See DeKalb Cnty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393 (2d Cir. 2016), *pet. for cert. pending*, No. 16-206 (filed Aug. 12, 2016).

Petitioner ably demonstrates in its brief why, under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), petitioner's individual complaint was timely

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* also represent that all parties have consented to the filing of this brief by submitting letters granting blanket consent to the filing of *amicus* briefs.

filed and the decision below should be reversed. *Amicus* supports petitioner's arguments in full.

Amicus writes separately to expand upon a critical point and to address the implications of that point for the Court's resolution of this case. Specifically, *amicus* will develop further the explanation why *American Pipe* can properly be understood only as an interpretation and application of Federal Rule of Civil Procedure 23, rather than as a judge-made exception to statutory time limitations. *Amicus* will further explain why, so understood, the rule of *American Pipe* should remain intact unless and until Rule 23 is amended under the procedures Congress provided in the Rules Enabling Act.

SUMMARY OF ARGUMENT

I. This Court explained in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), that the basis for that decision is Federal Rule of Civil Procedure 23. The Court described its opinion as an "interpretation" of the rule and held that a contrary rule requiring repetitive protective filings is "inconsistent with Rule 23." Subsequent decisions of this Court have applied *American Pipe* in a range of procedural circumstances and have explained that the policies underlying Rule 23's text and structure required those outcomes.

American Pipe cannot properly be considered an application of equitable tolling, as the Second Circuit erroneously suggested. Equitable tolling is a case-by-case doctrine that protects specific plaintiffs who, though diligently pursuing their rights, are unable to bring a timely cause of action and put the defendant on notice of their claims. *American Pipe* lacks these characteristics. It is not applied case-by-case, but rather applies to all members of a timely filed putative

class action, notwithstanding any specific plaintiff's diligence. And *American Pipe* does not excuse a plaintiff's failure to put a defendant on notice of a claim. When *American Pipe* applies, the filing of a class complaint has notified the defendant of each plaintiff's claim. There is nothing for equity to excuse.

American Pipe also complies with the Rules Enabling Act, as this Court held in *American Pipe* itself. Section 13 of the Securities Act of 1933 is materially indistinguishable from the statute this Court addressed in that case, and the Second Circuit's contrary conclusion cannot be squared with this Court's Rules Enabling Act precedents.

II. Because *American Pipe* interpreted Rule 23, it is entitled to enhanced "statutory" *stare decisis* effect. The Federal Rules of Civil Procedure are adopted by this Court through a process prescribed by Congress, and they have the force of law. Accordingly, when this Court interprets a federal rule, that interpretation is best reconsidered, if at all, through the rulemaking process Congress provided. Failing to follow that rulemaking process would unfairly penalize injured parties with claims that would have been considered timely and thus litigated on the merits, had the Second Circuit followed *American Pipe*.

ARGUMENT

I. THE RULE OF *AMERICAN PIPE* IS AN INTERPRETATION OF FEDERAL RULE OF CIVIL PROCEDURE 23

A. *American Pipe* Held That A Rule Requiring Individual Class Members To File Duplicate Protective Actions Is "Inconsistent With Rule 23"

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), this Court interpreted Rule 23 to require that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554.

There, the State of Utah had commenced a putative class action under the federal antitrust laws, alleging that several defendants had conspired in a bid-rigging scheme concerning the sale of concrete and steel pipe. *See id.* at 541. The district court deemed that private action to be timely under § 5(b) of the Clayton Act because it was filed within one year after the conclusion of a civil action brought by the United States. *See id.*[2] After the court granted the defendants' motion for an order that the suit could not be maintained as a class action, a group of municipalities and other local government entities

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[2] Section 5(b) provided that the time for filing a private action under the antitrust laws was "'suspended'" during the pendency, and for one year after the conclusion, of any civil proceeding instituted by the United States; it also stated that, whenever the suspension provision applied, any private action "'shall be forever barred unless commenced . . . within the period of suspension.'" *American Pipe*, 414 U.S. at 541-42 & n.3 (quoting 15 U.S.C. § 16(b) (1970)).

that had been members of the putative class filed motions to intervene as plaintiffs in the case. *See id.* at 542-44. If the filing of Utah's class complaint stopped the running of § 5(b)'s one-year period for the time between that filing and the district court's order denying class certification, then the municipalities' motions to intervene were timely. If, however, the one-year period continued to run against the municipalities despite the filing of the class complaint, then the motions to intervene were time-barred. *See id.* at 544, 561.

This Court held that the intervention motions were timely. That outcome followed from, and reflected an interpretation of, Federal Rule of Civil Procedure 23. As this Court stated in the opinion's very first line, *American Pipe* considered — and resolved — "the relationship between a statute of limitations and the provisions of [Rule] 23 regulating class actions in the federal courts." *Id.* at 540.

As petitioner details, *American Pipe* began by interpreting Rule 23 on the basis of its history and purpose. *See* Pet. Br. 16-19. In its original form, Rule 23 permitted "spurious" class actions binding only upon named parties; the spurious class action was "'merely an invitation to joinder'" that allowed class members to "await developments in the trial or even final judgment on the merits" to decide whether to intervene, so that the class members could "benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." 414 U.S. at 545-47 (quoting 3B James W. Moore, *Federal Practice* ¶ 23.10[1], at 23-2603 (2d ed.)). The 1966 amendments to Rule 23 "were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the

class would be identified before trial on the merits and would be bound by all subsequent orders and judgments." *Id.* at 547.

Under Rule 23 as amended, the class action was transformed from "an invitation to joinder" into "a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id.* at 550. That purpose could be achieved only if putative class members "stood," as of the filing of the class complaint, "as parties to the suit." *Id.* at 550-51. The Court thus concluded that "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." *Id.* at 550.[3]

An alternative rule, this Court continued, would not be "consistent with federal class action procedure" under Rule 23 because it would preclude the efficiencies the Rule was adopted to allow. *Id.* at 553-54. The Court thus concluded that a scheme within which class members "must individually meet the timeliness requirements . . . is *simply inconsistent with Rule 23 as presently drafted.*" *Id.* at 550 (emphasis added). The Court determined that its "interpretation of the Rule" was "necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." *Id.* at 555-56.

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[3] Put differently, under Rule 23, a putative class member's later-filed complaint should not be treated as "a separate cause of action which must individually meet the timeliness requirements." *American Pipe*, 414 U.S. at 550; *see* Pet. Br. 30-38.

B. Subsequent Decisions Of This Court Reinforce The Conclusion That *American Pipe* Interpreted Rule 23

Subsequent decisions of this Court have cemented *American Pipe*'s interpretation of Rule 23 as a settled principle of federal civil procedure. Just a few months after *American Pipe* was decided, this Court held in a federal antitrust and securities case that each member of a class certified under Rule 23(b)(3) who can be identified through reasonable effort must receive notice of the right to request exclusion from the suit. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 159, 173-77 (1974). In so holding, the Court rejected the argument that "class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than [the named plaintiff]." *Id.* at 176 n.13. It explained that the argument was "disposed of by our recent decision in" *American Pipe*, "which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class." *Id.*

The Court in *Eisen* thus recognized the critical role *American Pipe* plays in ensuring the proper functioning of Rule 23's provisions affording unnamed class members rights to receive notice and to opt out. Without *American Pipe*, those provisions "would be irrelevant because the statute of limitations period for absent class members would, more often than not, have expired, making the right to pursue individual claims meaningless," as the Tenth Circuit has recognized. *Realmonte v. Reeves*, 169 F.3d 1280, 1284 (10th Cir. 1999); *see* Pet. Br. 10.

Three Terms after *Eisen*, this Court applied *American Pipe*'s interpretation of Rule 23 to hold that an

unnamed class member could intervene after final judgment in an employment-discrimination case to appeal a denial of class certification, even though the remaining time in the limitations period had run between the denial of class certification and the filing of the motion to intervene. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 392 n.11, 396 (1977). The Court relied on *American Pipe*, explaining that "[t]he lawsuit had been commenced by the timely filing of a complaint for classwide relief, providing United with 'the essential information necessary to determine both the subject matter and size of the prospective litigation.'" *Id.* at 392-93 (quoting *American Pipe*, 414 U.S. at 555). The Court observed that an alternative rule requiring intervention during the limitations period "would induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination." *Id.* at 394 n.15. Such filings, the Court said, "would be the very 'multiplicity of activity *which Rule 23 was designed to avoid.*'" *Id.* (quoting *American Pipe*, 414 U.S. at 551) (emphasis added).

In 1983, the Court issued two decisions in which it again reaffirmed and elaborated on *American Pipe*'s interpretation of Rule 23. In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Court held that *American Pipe* applies not only when members of a putative class move to intervene, but also when they file distinct actions after a denial of class certification and "within the time that remains on the limitations period." *Id.* at 346-47. In that case, the original named plaintiffs filed a putative class action alleging employment discrimination, but class certification was

denied and a member of the asserted class subsequently filed his own lawsuit. *See id.* at 347-48.

The Court explained that limiting the *American Pipe* rule to intervention would generate "[m]uch the same inefficiencies" the Court sought to avoid in *American Pipe*. *Id.* at 350. Just as in the case of intervention, the Court explained, "[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations," resulting in "a needless multiplicity of actions — precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 350-51.

The same year it decided *Crown, Cork & Seal*, the Court applied *American Pipe*'s interpretation of Rule 23 in a case where state law supplied the limitations period. *See Chardon v. Fumero Soto*, 462 U.S. 650 (1983). The Court explained that *American Pipe* had adopted a "federal rule" that "the statute of limitations is tolled by the filing of an asserted class action" and noted the court of appeals' recognition that *American Pipe* "had interpreted the Federal Rules of Civil Procedure" to permit such tolling. *Id.* at 654, 658. The dissenting Justices in *Chardon* agreed with the majority that *American Pipe* "interpret[ed] Rule 23 to contain a rule that, during the pendency of a class action, underlying statutes of limitations would be tolled as to individual class members." *Id.* at 665 (Rehnquist, J., dissenting); *see id.* at 667-68.[4]

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[4] The plaintiffs' claims in *Chardon* arose under 42 U.S.C. § 1983, and the Court had interpreted 42 U.S.C. § 1988 to require courts to borrow both state statutes of limitations and state rules for tolling those statutes. *See* 462 U.S. at 657. The

This Court's decisions in *Eisen*, *McDonald*, *Crown, Cork & Seal*, and *Chardon* reaffirmed that *American Pipe* is an interpretation of Rule 23 and demonstrate that that interpretation is necessary for Rule 23 to operate as intended in a range of procedural postures. Moreover, as petitioner correctly explains, neither Congress nor this Court has sought to amend Rule 23 to operate any differently in the decades since *American Pipe* was decided. *See* Pet. Br. 21-22. Rather, as recently as 2012, this Court described *American Pipe* as having "based [its] conclusion on 'the efficiency and economy of litigation which is a principal purpose of [Fed. Rule Civ. Proc. 23 class actions].'" *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 226 n.6 (2012) (quoting *American Pipe*, 414 U.S. at 553) (second brackets added in *Credit Suisse*).

C. *American Pipe* Is Not An Application Of Equitable Tolling

The Second Circuit in *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), professed ambivalence concerning "the source of authority" for *American Pipe* and suggested that it might be an application of equitable tolling. 721 F.3d at 108. It is not. *See* Pet. Br. 18-19. *American Pipe*'s holding derives from statutory, not

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Court held that, in a § 1983 case, the "federal interest in assuring the efficiency and economy of the class-action procedure," embodied in Rule 23, "is vindicated as long as each unnamed plaintiff is given as much time to intervene or file a separate action as he would have under" analogous state law. *Id.* at 661 (footnote omitted). In *Chardon*, that meant applying Puerto Rico's rule providing that the limitations period ran anew from the denial of class certification. *See id.* at 661-62. The dissent would have held that *American Pipe* requires suspension rather than renewal in all cases. *See id.* at 665 (Rehnquist, J., dissenting).

equitable, authority. *American Pipe* relied on an "interpretation" of Rule 23, 414 U.S. at 555-56, which is itself an exercise of this Court's rulemaking power under the Rules Enabling Act, 28 U.S.C. § 2072.

A proper understanding of equitable tolling confirms that *American Pipe* derives from Rule 23, not equity. The principles of equitable tolling have been "long-settled" for centuries. *Credit Suisse*, 566 U.S. at 227. Although courts apply the doctrine in various circumstances, "[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." *Id.* (emphasis omitted); *see CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (equitable tolling applies "when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely claim"). For example, equitable tolling may excuse an untimely filing in a fraud case "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part" or "where the ignorance of the fraud has been produced by affirmative acts of the guilty party." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 347, 348 (1875); *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (citing *Bailey*'s formulation of equitable tolling).

Equitable tolling is thus a case-by-case doctrine concerned with avoiding a specific sort of unfairness in a specific case. *See Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (doctrine of equitable tolling "eschews mechanical rules" and seeks to avoid "an inequity founded upon some change in the condition or relations *of the property or the parties*") (emphasis

added). Specifically, it seeks to protect a blameless plaintiff who, in a particular case, filed late due to circumstances beyond his control.[5] In operating this way, equitable tolling *excuses* the usual requirement codified in statutory time bars that defendants be notified of claims against them within a certain time period, when doing so is necessary to ensure fairness to the plaintiff. *Cf. Bailey*, 88 U.S. (21 Wall.) at 349 (observing that allowing a defendant to ensure dismissal by intentionally hiding his fraud during the limitations period would "make the law which was designed to prevent fraud the means by which it is made successful and secure").[6]

American Pipe is unlike equitable tolling in two crucial respects. First, it is not applied case-by-case, plaintiff-by-plaintiff, in an attempt to right wrongs and preserve fundamental fairness. It is a rule of procedure that applies to any member of a putative class, regardless whether the plaintiff acted diligently during the limitations period. As interpreted

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[5] The moral principle underlying equitable tolling is both intuitive and fundamental. *See* Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 Notre Dame L. Rev. 1245, 1252 (2012) (setting forth "one of the truly 'first principles' we draw from the logic of moral judgment," namely, "that we do not hold people blameworthy or responsible for acts they were powerless to affect"), *available at* http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1024&context=ndlr.

[6] Because equitable tolling is fundamentally concerned with fairness to the *plaintiff*, it is understandable that equitable tolling is incompatible with statutory repose periods, which prioritize the *defendant's* right to achieve peace. *See Waldburger*, 134 S. Ct. at 2183; Pet. Br. 40. *American Pipe*, however, elevates the interests of neither the plaintiff nor the defendant; it furthers the procedural policies of Rule 23. *See* 414 U.S. at 555-56.

in *American Pipe*, "Rule 23 both permits *and encourages* class members to rely on the named plaintiffs to press their claims." *Crown, Cork & Seal*, 462 U.S. at 352-53 (emphasis added). Had equity been its source, the *American Pipe* rule would have been limited to those who reasonably relied on the class-action filing, whereas the Court in *American Pipe* expressly refused to apply a "different . . . standard . . . to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed)." 414 U.S. at 551.

Second, *American Pipe* does not excuse the failure to notify defendants of adverse claims, as does equitable tolling. On the contrary, this Court has recognized that *American Pipe* applies where the filing of a timely class action "'notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs.'" *Crown, Cork & Seal*, 462 U.S. at 353 (quoting *American Pipe*, 414 U.S. at 555); *see also American Pipe*, 414 U.S. at 562 (Blackmun, J., concurring) (claims to which *American Pipe* applies "invariably will concern the same evidence, memories, and witnesses as the subject matter of the original class suit, and the defendant will not be prejudiced by later intervention"). Thus, under *American Pipe*, there is no lack of notice for equity to excuse.[7]

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[7] Passing references to *American Pipe* in a couple of this Court's equitable-tolling decisions provide no basis on which to ignore the fundamental differences between *American Pipe*'s interpretation of Rule 23 and the doctrine of equitable tolling. *Cf. Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1368 (2013) ("Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after?").

D. Rule 23, As Interpreted In *American Pipe*, Complies With The Rules Enabling Act

American Pipe's interpretation of Rule 23 comports fully with the Rules Enabling Act. In *IndyMac*, the Second Circuit concluded (in the alternative) that applying *American Pipe* to § 13 of the Securities Act of 1933, 15 U.S.C. § 77m, would modify a "*substantive* right" protected by § 13 and thereby violate the Rules Enabling Act. 721 F.3d at 109; *see* 28 U.S.C. § 2072(b) (Federal Rules of Civil Procedure may not "abridge, enlarge or modify any substantive right"). That is incorrect.

American Pipe itself rejected an argument that the "'substantive' element" of the statutory time bar caused the Court's interpretation of Rule 23 to violate the Rules Enabling Act. *See* 414 U.S. at 556-58. "The proper test," the Court explained, "is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *Id.* at 557-58. Allowing petitioner to pursue claims that were filed on a class-wide basis within the repose period is consonant with § 13 and the policies statutes of repose are intended to further. *See* Pet. Br. 50-51.

In addition, the Second Circuit's conclusion that *American Pipe* implicates the Rules Enabling Act because § 13 is "a statute of repose" defining "a substantive right," *IndyMac*, 721 F.3d at 109 n.17, ignores that § 13 is relevantly indistinguishable from the provision at issue in *American Pipe*. The statute in *American Pipe*, 15 U.S.C. § 16(b) (1970) (now codified at 15 U.S.C. § 16(i)), provided that lawsuits not "commenced" within one year of a government suit under the antitrust laws would be "forever barred." *See* 414 U.S. at 542 n.3. Notably, the one-year period

ran from the conclusion of the government action — a time unrelated to a plaintiff's discovery of a claim. The provision thus bore the same hallmarks that respondents claim characterize "statutes of repose." *See* Br. in Opp. 26.[8] Accordingly, § 13's characteristics as a repose period provide no basis to distinguish this Court's holding in *American Pipe* that its rule was "consonant with the legislative scheme" and did not implicate the Rules Enabling Act. 414 U.S. at 557-58.

The Second Circuit's holding also cannot be squared with this Court's Rules Enabling Act precedents. The Second Circuit's reasoning appears to be: (1) § 13 protects a substantive right; (2) *American Pipe* would affect § 13; therefore, (3) *American Pipe* violates the Rules Enabling Act. But the proper test "is *not* whether the rule affects a litigant's substantive rights; most procedural rules do." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality) (emphasis added). Rather, "[w]hat matters is what the rule itself *regulates*." *Id.* (emphasis added); *see also id.* at 412 n.10 (distinguishing between "what the Federal rule *regulates*

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[8] In fact, the provision at issue in *American Pipe* has been referred to as a "statute of repose." The district court in *American Pipe* called it an "antitrust statute of repose." *Utah v. American Pipe & Constr. Co.*, 50 F.R.D. 99, 103 (C.D. Cal. 1970), *remanded in part*, 473 F.2d 580 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974). In their petition for a writ of certiorari, the defendants in that case referred to the provision as a "statute of repose." Pet. for Cert. at 22, *American Pipe*, *supra*, No. 72-1195 (U.S. filed Mar. 2, 1973), 1973 WL 346627. And, four years after *American Pipe*, this Court quoted with approval the Ninth Circuit's description of the provision as "'a statute of repose.'" *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 334 (1978) (quoting *Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867, 869 (9th Cir. 1978)).

[and] its incidental *effects*"); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) ("[t]he test must be whether a rule really regulates procedure"). Here, as petitioner explains, the rule regulates Rule 23's precise *procedural* concern: whether the plaintiff may recover through a distinct lawsuit or only as part of the original class action.[9]

In all events, § 13 does not in fact protect any substantive right for purposes of the Rules Enabling Act. *See* Pet. Br. 50 & n.11. It governs only *when* a lawsuit may be brought. When Congress enacts statutes that create or destroy substantive rights to relief, it does so in clear terms. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416-17 (1998); *compare* 15 U.S.C. § 77m (governing when a suit may be "brought") *with id.* § 1635(f) ("An obligor's *right* of rescission *shall expire* three years after the date of consummation . . . .") (emphases added). It did not do so here.

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[9] Put differently, *American Pipe* determines what event constitutes the timely filing of a complaint under a federal statutory limitations period. This Court has held that such a determination is procedural and properly made by the Federal Rules. *See West v. Conrail*, 481 U.S. 35, 38-39 (1987) (complaint timely filed under federal statute of limitations because suit was "commenced" as that term was defined under Federal Rule of Civil Procedure 3).

II. ANY CHANGE TO *AMERICAN PIPE*'S SETTLED INTERPRETATION OF RULE 23 SHOULD BE ACCOMPLISHED THROUGH THE RULES ENABLING ACT'S PROCEDURE FOR AMENDING THE FEDERAL RULES OF CIVIL PROCEDURE

A. As An Interpretation Of Rule 23, *American Pipe* Has Enhanced *Stare Decisis* Effect

American Pipe's interpretation of Rule 23 is entitled to great weight under this Court's cases. The Court has held that, while "[o]verruling precedent is never a small matter," *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015), *stare decisis* principles apply with even greater force to decisions interpreting federal statutes, *see Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). In such cases, "the legislative power is implicated, and Congress remains free to alter" the operation of the federal rule in issue. *Id.* at 172-73. The rationale underlying statutory *stare decisis* is that, when this Court interprets a statute (or a rule), the holding "effectively becomes part of the statutory scheme, subject . . . to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects." *Kimble*, 135 S. Ct. at 2409.

The same rationale applies to interpretations of the Federal Rules of Civil Procedure. Those rules "ha[ve] the force of a federal statute." *Sibbach*, 312 U.S. at 13. And, just like federal statutes, they can be changed by Congress. *See Dickerson v. United States*, 530 U.S. 428, 437 (2000). Parties unhappy with the way this Court interprets a federal rule can simply "take their objections across the street, and Congress can correct any mistake it sees." *Kimble*,

135 S. Ct. at 2409; *see also Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980) (noting that "the doctrine of *stare decisis* weighs heavily against" overruling a precedent interpreting a Federal Rule of Civil Procedure).

Indeed, the case for enhanced *stare decisis* is even *stronger* in the context of the Federal Rules because this Court, in addition to Congress, is empowered to adopt amendments on its own. *See* 28 U.S.C. §§ 2072(a), 2074(a) (rules proposed by this Court take effect unless Congress provides otherwise by law); *see also* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431, 462 (2008), *available at* http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2383&context=bclr. And it is stronger still here, where, despite 30 amendments to the Federal Rules since *American Pipe* was decided, the rule of *American Pipe* has remained undisturbed. *See* Pet. Br. 21; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) (force of statutory *stare decisis* is "enhanced" when Congress amends a statute "without providing any modification of [this Court's] holding").

"As against this superpowered form of *stare decisis*," respondents "would need a superspecial justification to warrant" abrogating *American Pipe*. *Kimble*, 135 S. Ct. at 2410; *see id.* at 2409 (such a justification must rise "above the belief that the precedent was wrongly decided"). They have presented no such justification.

B. Congress Has Set Forth The Process For Amending Rule 23

The Rules Enabling Act authorizes this Court to prescribe rules of procedure for cases in the United States district courts. *See* 28 U.S.C. § 2072. It also provides for the method of prescribing those rules,

see id. § 2073, and for the submission of rules to Congress before they take effect, *see id.* § 2074.

In exercising the rulemaking authority Congress granted, this Court promulgates rules of civil procedure through a "committee process" that invites input from judges, scholars, government agencies, and members of the bar and the public.[10] Interested parties can submit suggestions for changes to the rules.[11] "Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Observing the rulemaking process when altering the way Federal Rules operate honors the statutory *stare decisis* principles described above. This Court's initial interpretation of a rule puts the ball in "Congress's court, for acceptance or not as that branch elects." *Kimble*, 135 S. Ct. at 2409. And Congress exercises that prerogative through the process it prescribed in the Rules Enabling Act. *Cf. Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114-19 (2009) (Thomas, J., concurring in part and concurring in the judgment) (questions committed to the Court's Rules Enabling Act authority best addressed through the "full airing that rulemaking provides").

Additionally, declining to follow *American Pipe*'s interpretation of Rule 23 in this case would retro-

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[10] U.S. Courts, *How the Rulemaking Process Works*, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works (last visited Mar. 5, 2017).

[11] *See* U.S. Courts, *How to Suggest a Change to the Rules of Practice and Procedure and Forms*, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-suggest-change-rules-practice-and-procedure-and-forms (last visited Mar. 5, 2017).

actively deprive petitioner (and similarly situated plaintiffs, such as *amicus*) of the ability to have their claims adjudicated on the merits. Such an outcome would violate "[e]lementary considerations of fairness," which "dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *see also id.* ("settled expectations should not be lightly disrupted"). The Rules Enabling Act mitigates this sort of unfairness by inserting a delay between a rule's adoption and its taking effect and by permitting this Court to prevent a new rule from applying to pending proceedings where "the application of such rule in such proceedings would not be feasible or would work injustice." 28 U.S.C. § 2074(a).[12]

Beyond upsetting the settled expectations of petitioner, a retroactive change to *American Pipe* would grant respondents an unjustifiable windfall. Under *American Pipe*, Rule 23 has long protected the ability of putative class members to press their own lawsuits where a timely class complaint has been filed. With notice of a change in the Rule (or had the Second Circuit not refused to follow *American Pipe*'s inter-

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[12] As this Court has recognized, the law has long disfavored changes in law that "attach[] a new disability[] in respect to transactions or considerations already past." *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814) (No. 13,156) (Story, J.); *see also Landgraf*, 511 U.S. at 265 ("[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."); Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425, 471 (1982) ("The rule of law . . . is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance.").

pretation of Rule 23), petitioner would have filed the requisite protective action and would presumably have recovered for its injuries. *Cf.* Pet. Br. 14 (noting that respondents settled with the class members that did not opt out). Yet, rather than suggest a change to the Committee on Rules of Practice and Procedure,[13] respondents seek a change in class-action procedure that would amount to immunity from liability in this and other pending cases.

CONCLUSION

The judgment of the court of appeals should be reversed.

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[13] *See* U.S. Courts, *How To Suggest a Change to the Rules of Practice and Procedure and Forms*, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-suggest-change-rules-practice-and-procedure-and-forms (last visited Mar. 5, 2017).

Respectfully submitted,

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